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No. 82-57

In the Supreme Court of the United States

OCTOBER TERM, 1982

RUSSELL HORWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the disqualification of one of his attorneys from representing him in a drug trafficking prosecution violated the Sixth Amendment by denying him counsel of his choice.

1. a. In September 1981, petitioner and certain co-defendants were charged in an indictment returned in the United States District Court for the Northern District of Florida with various offenses involving drug trafficking. Thereafter, the district court granted the government's motion to disqualify Clyde M. Taylor, Jr., one of petitioner's attorneys.

The district court's disqualification order was based upon the affidavits of two witnesses, Pat Robinson and Tom Alexander, who were expected to testify at petitioner's trial.[1] The affidavit of Robinson stated that, while he was

[1]We have been informed by the Assistant United States Attorney responsible for the case that Robinson and Alexander did subsequently testify at trial.

in the office of petitioner's attorney on another matter, he "discussed with [the attorney] about [the attorney] getting in touch with Tom Alexander for the purpose of getting me work unloading marijuana. [The attorney] indicated that he would contact Alexander" (Pet. App. 4; brackets in original). Alexander then came to the office of Taylor, the attorney. The affidavits of Robinson and Alexander further indicated that while they were in Taylor's office, they discussed the possibility that Robinson might assist in unloading marijuana from a Constellation airplane in the near future and that Taylor was in and out of his office during this time. Alexander stated that he was reasonably sure that Taylor had full knowledge of the context of the conversation and that the Constellation aircraft to which he and Robinson referred was that apprehended at the Panama City airport in February 1979. Petitioner was alleged to have been one of the co-conspirators in this unlawful importation of marijuana (*id.* at 4-5).

The district court observed that these affidavits, if true, showed Taylor's participation in the conspiracy and that the subject matter of the affidavits would be a matter of proof at trial (1/20/82 Order at 2-3). The court concluded that such evidence would create a reasonable possibility of an appearance of impropriety by Taylor. In addition, the court concluded that such evidence, even if ultimately false, could bring before the jury an issue of Taylor's credibility that might operate to petitioner's detriment. On this basis, and citing the requirement in Canon 9 of the Code of Professional Responsibility that a lawyer avoid even the appearance of impropriety, the court disqualified Taylor (1/20/82 Order at 3-4; Pet. App. 5).

b. In an opinion dated March 24, 1982, the court of appeals affirmed the disqualification order, concluding "[a]fter serious reflection on the circumstances of this case

* * * that the likelihood of public suspicion outweighs [petitioner's] interest in being represented by the attorney in question" (Pet. App. 10). The court observed that if testimony similar to that in the affidavits were offered, it would "portray [petitioner's] attorney as having engaged in thoroughly improper and unethical conduct and thus will impugn severely his integrity and credibility in the eyes of the jury" (*ibid.*). The court acknowledged that petitioner had indicated that he would be willing to waive any ethical problems in order to be represented by Taylor, but it concluded that this would not be an appropriate solution "because the ethical violation involves public perception of the lawyer and the legal system rather than some difficulty in the attorney's effective representation of [petitioner]" (Pet. App. 11). Judge Kravitch dissented, disagreeing with the balance struck by the majority between the likelihood of public suspicion and petitioner's interest in being represented by Taylor (*id.* at 13-16).

c. Petitioner's jury trial was not stayed pending appeal of the disqualification order, and petitioner has since been convicted of conspiracy to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(d) and 1963); conducting and participating in the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c) and 1963); conspiracy to import marijuana (21 U.S.C. 960 and 963); importing marijuana (21 U.S.C. 952(a) and 960); conspiracy to possess marijuana with intent to distribute (21 U.S.C. 846); and possession of marijuana with intent to distribute (21 U.S.C. 841(a)). On April 28, 1982, petitioner was sentenced to a total of 35 years' imprisonment and fined a total of $110,000 on these counts and was sentenced to special parole terms of two years on two counts. Petitioner has taken an appeal from his conviction, but he has not yet filed his brief in the court of appeals.

2. a. Petitioner now requests this Court to review the March 24, 1982 decision of the court of appeals affirming the pretrial order disqualifying one of his attorneys, contending (Pet. 7-12) that the disqualification violated his Sixth Amendment rights by depriving him of the assistance of counsel of his choice. In our view, there is a substantial question whether the court of appeals even had jurisdiction under 28 U.S.C. 1291 of the appeal of the district court's order disqualifying counsel pursuant to the collateral order doctrine.[2] Moreover, if the court of appeals now affirms petitioner's conviction, he will be able to present the disqualification issue to this Court together with any other claims he may have in a petition for a writ of certiorari seeking review of the court of appeals' affirmance. If the court of appeals reverses his conviction under circumstances that would preclude a new trial, the disqualification issue will be moot. And, finally, if the court of appeals reverses the conviction and affords petitioner the right to a new trial, petitioner will be in the same position he occupied when the court of appeals affirmed the disqualification order in March of this year, before he was tried for the first time. He could file a petition for a writ of certiorari at that time seeking review of the court of appeals' affirmance of the disqualification order. Of course, if petitioner filed a certiorari petition under those circumstances, the disqualification issue would again be presented in an interlocutory posture, because he would not yet have been retried. The

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[2]See Brief for the United States in Opposition (at 9-15) in *Greger* v. *United States*, No. 81-1357, 1981 Term. The government did not challenge the jurisdiction of the court of appeals under 28 U.S.C. 1291 to review the order disqualifying the attorney, but the court of appeals held that the order was appealable (Pet. App. 5). The Ninth Circuit has held that such an order is not appealable. *United States* v. *Greger*, 657 F. 2d 1109 (9th Cir. 1981), petition for cert. pending, No. 81-1357.

Court accordingly might decline to consider the disqualification issue at that time in the exercise of its discretionary certiorari jurisdiction, choosing instead to await the outcome of the retrial and any subsequent appeal to determine whether certiorari is warranted on the merits of the disqualification issue.

3. In any event, the decision of the court of appeals is correct, does not conflict with any decision of this Court or another court of appeals, and raises no issue warranting review by this Court. Petitioner concedes (Pet. 7) that a defendant does not have an absolute right to counsel of his choice.[3] The only issue presented, then, is whether the court of appeals correctly held in the circumstances of this case that petitioner's interest in being represented by a particular lawyer was outweighed by the public interest in enforcement of ethical standards intended to ensure confidence in the integrity of the bar and the criminal justice system. In our view, the court of appeals clearly reached the correct result. This is not a case involving a vague "appearance of impropriety" about which there could be some disagreement regarding its effect on the public's perception of and confidence in the bar and the criminal justice system. The affidavits of Robinson and Alexander attested to facts establishing that petitioner's attorney not only had advance knowledge of a criminal transaction with which petitioner was charged, but also that he was a participant in a conspiracy with petitioner (1/20/82 Order at 2). We agree with the district court's observation that "any citizen, not a cynic, but any citizen would be suspicious of Taylor's representation of [petitioner]" in these circumstances (1/20/82 Order

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[3]See generally Brief for the United States as Amicus Curiae at 18-23, in *Morris* v. *Slappy*, No. 81-1095, 1981 Term.

at 3). Cf. *United States* v. *Salinas*, 618 F. 2d 1092 (5th Cir. 1980).[4]

The district court could not, of course, be certain whether the affidavits of Robinson and Alexander were true or false in their account of Taylor's knowledge or conduct, and, as the courts below acknowledged (1/20/82 Order at 3-4; Pet. App. 12 n.*), trial testimony by Robinson and Alexander to the same effect would have been subject to impeachment. But as the court of appeals pointed out (Pet. App. 12 n.*), the allegations, regardless of their truth or falsity, bring the attorney's integrity and credibility into question. The circumstance therefore might engender a public suspicion with regard to possible impropriety that could taint the integrity of the entire proceeding and the public's confidence in that integrity. The Sixth Amendment does not require a trial court to countenance such a situation and to ignore reasonable ethical rules of the legal profession designed to protect against this very eventuality. See, *e.g.*, Advisory Committee Note to Fed. R. Crim. P. 44(c), 77 F.R.D. 594, 602-603, quoting *United States* v. *Dolan*, 570 F. 2d 1177, 1183-1184 (3d Cir. 1978).

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[4]Petitioner contends (Pet. 9-10) that other cases involving disqualification on the basis of an appearance of impropriety have turned on whether it "appeared" that another ethical canon may have been violated. Even assuming that petitioner is correct that disqualification on the basis of an appearance of impropriety must be limited to such circumstances, the conduct of counsel described in the affidavits in this case creates an appearance of a violation of a number of provisions of the ABA Code of Professional Responsibility (1978). See Canon 1; DR 1-102(A)(3), (5) and (6); DR 7-102(A)(7) and (8).

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

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